ing railroads substantially exceeds the unloading charge collected with respect both to New York and Philadelphia and with respect to each category of fruit or vegetable unloaded. These costs are stated by the Commission at 286 I. C. C. 126, 127, and 138. For example, at New York the unloading cost of the Pennsylvania Railroad is $2.22 per ton in cases where the unloading charge is only $1.05 per ton; the cost is $3.23 per ton where the unloading charge is only $1.35 per ton; and the cost is $4.11 per ton where the unloading charge is only $1.65 per ton. In other words, the unloading costs are double or more the unloading charges. These costs are substantial evidence in support of the Commission's finding that the unloading charges are no more than just and reasonable.

Third: As stated by the Commission at 286 I. C. C. 121, these unloading charges apply only at certain designated railroad stations at New York and Philadelphia where the railroads do the unloading. If the carloads of fresh fruits and vegetables are delivered on private sidetracks or team tracks or public delivery tracks in New York or Philadelphia, the consignees, and not the railroads, do the unloading, and the unloading charges do not apply in such instances. The unloading charges apply only when the carloads of fresh fruits and vegetables are delivered at certain designated railroad stations.

It should be emphasized that the station delivery of fresh fruits and vegetables, in connection with which the unloading charges under consideration apply, is highly beneficial to the trade as compared with team-track delivery. The Commission's reports state those benefits clearly and fully. For example, at 286 I. C. C. 125, the Commission found:

> "In taking pier station delivery, the fruit and vegetable trade has the advantage of displaying the entire

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contents of the car, thus affording the buyer the benefit of a thorough examination of the freight; of using the pier facilities as a sales' mart; and of occupying auction-room facilities without special charge therefor."

Again, at 286 I. C. C. 127, the Commission found:

"Prior to the arrival of the shipments at the piers, the carriers are informed of the contents of the cars, the names of the consignees, and other pertinent details. This permits notification of the receivers of the freight in advance of arrival and enables the carriers to allot space on their piers for each consignment. As regards the allotment of space, the piers are generally mapped out so as to give each consignee a specified location for the contents of the cars after unloading. Many shipments are displayed by the consignees at these locations on the piers so as to facilitate inspection of the commodities by prospective purchasers, who, prior to the auction, usually inspect the fruit while it is on display on the pier floor. Practically all the citrus fruit, as well as fresh fruit (other than citrus), after being unloaded on the piers, is sold at public auction in rooms on the second floors of the piers assigned for that purpose. Cantaloups and melons, as a rule, are not sold at auction, but are bought at private sales on the pier floor where the packages are displayed."

Similarly, at 286 I. C. C. 122, the Commission found:

"Respondents accord shippers numerous services in respect of the movement of fresh fruits and vegetables to pier stations in New York and Philadelphia. These services include, among others, notification to consignees of the location of their freight in transit, extra heat and light at the terminals incident to such traffic, and the providing of auction rooms and other similar services. This indicates the extent to which respondents have cooperated with the fruit and vegetable trade in facilitating the receipt of the freight and its sale."

Finally, at 286 I. C. C. 139, the Commission found that:

> "* * * delivery on the terminal platforms is more advantageous than team-track delivery to the Philadelphia consignees."

In substance, the station delivery of fresh fruits and vegetables which involves carriers' unloading at New York and Philadelphia, is a special type of delivery which carries with it special benefits to the trade not available from team-track or private siding delivery.

The handling of perishables at railroad stations at New York and Philadelphia is a most extraordinary and unusual operation. After the perishables are unloaded onto the station floors, the stations become huge wholesale stores at which the perishables are displayed, inspected by prospective buyers, and sold. This system of display, inspection, and sale is of great value to the trade, as found by the Commission and cannot be conducted at team tracks.

At the stations, however, the railroads do the unloading. The fact that the trade receives special benefits from station delivery where the railroads do the unloading, as contrasted with team-track delivery where the trade does its own unloading, is substantial evidence in support of the Commission's finding that these unloading charges at these stations are just and reasonable.

Thus, there is substantial evidence supporting the Commission's finding that these unloading charges are just and reasonable.

The Questions Presented Have Been Decided by the Supreme Court

The law applicable to this case is clear and well established. In *Mississippi Valley Barge Line Co. v. United States*, 292 U. S. 282, 286, the Supreme Court said: "The

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structure of a rate schedule calls in peculiar measure for the use of that enlightened judgment which the Commission by training and experience is qualified to form. * * * It is not the province of a court to absorb this function to itself." In *Swift & Co.* v. *United States*, 316 U. S. 216, 223, the Supreme Court said: "If there was evidence to sustain the Commission's findings on these matters, its conclusion * * * must be sustained." Similarly, in *Chicago, R. I. & P. Ry.* v. *U. S.*, 274 U. S. 29, 33, the Supreme Court said: "* * * if the determination of the Commission finds substantial support in the evidence, the courts will not weigh the evidence nor consider the wisdom of the Commission's action." Likewise, in *McLean Trucking Co.* v. *U. S.*, 321 U. S. 67, 88, the Supreme Court said: "If the Commission did not exceed the statutory limits within which Congress confined its discretion and its findings are adequate and supported by evidence, it is not our function to upset its order." Finally, in *I. C. C.* v. *Hoboken R. Co.*, 320 U. S. 368, 378, the Supreme Court said that a finding of the Commission "if supported by evidence, is conclusive on the courts."

The publication by railroads of separate charges for terminal services, which include unloading services, is specifically authorized by Section 6(1) of the Interstate Commerce Act.[4]

Plaintiff-Appellants assert that these unloading charges are improper because the unloading services precede delivery. There is no basis for such assertion. The Commission found at 272 I. C. C. 662 that:

> "Such charges are in substantially the same category as those for switching, transit, refrigeration, and var-

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[4] The text of this provision, 49 U.S.C. 6(1) is annexed hereto as Appendix D.

ious other special services for which separate charges are published."

All of these charges are for accessorial services performed prior to delivery.

Plaintiff-Appellants also assert that the Commission should have "investigated" the line-haul rates before approving and authorizing the unloading charges. The Commission remarked that the propriety of the separate unloading charges could be determined "without an extensive showing with respect to the reasonableness of the line-haul rates". (286 I. C. C. 140) The Commission, however, did not, as appellants suggest, totally disregard the question of the reasonableness of the line-haul rates. It pointed out that the level of the line-haul rates to New York and Philadelphia was not higher than the level of rates to other points where shippers unload or charges are assessed for unloading (286 I. C. C. 140). It should be noted in this connection that many of these rates have been prescribed or approved by the Commission (272 I. C. C. 662). In these circumstances the Commission properly took the view that the line-haul rates could be presumed to be just and reasonable in the absence of a showing otherwise by the protestants. Compare *Charges for Loading and Unloading Carload Freight,* 269 I. C. C. 25, cited, discussed, and quoted from at pages 140-141 of the Commission's report of May 7, 1952, here involved. (286 I. C. C. 119).

Various separate charges for all of the many accessorial services, such as refrigeration, transit, switching, reconsignment, unloading and so forth, have been published by the railroads and approved by the Commission without concurrently investigating the line-haul rates.[5] But the Plaintiff-

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[5] See, for example, *Loading and Unloading Carload Freight*, 101 I.C.C. 394; *Charges for Loading and Unloading Carload Freight*, 269 I.C.C. 25; *Berg Industrial Alcohol Co.* v. *Reading Co.*, 142 I.C.C. 161; *Blocking and*

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Appellants are safeguarded as a matter of law with respect to the reasonableness of the line-haul rates by virtue of Section 13(1) of the Interstate Commerce Act which authorizes the filing of complaints.[6] If Plaintiff-Appellants were serious in their belief that the publication of separate charges for unloading made the line-haul rates unreasonable, they could have filed a complaint attacking the line-haul rates under Section 13(1). Plaintiff-Appellants still have the right to file such a complaint if they choose to do so. This is the proper procedure consistently followed in such cases. For example, in *Charges for Loading and Unloading Carload Freight*, 269 I. C. C. 25, 30-32, the Commission approved unloading charges at numerous points. The protestants argued that the railroads should not be permitted to increase the unloading charges without first justifying the level of the through charges which would result. The Commission said:

> "These line-haul rates, many of which have been prescribed or approved by this Commission, must, *unless otherwise shown in a proper proceeding*, be presumed to be just and reasonable." (Emphasis supplied).

The "proper proceeding" above referred to is a complaint proceeding under Section 13(1). The approval of the unloading charges in this case has never precluded, and does not now preclude, Plaintiff-Appellants from filing a complaint with the Commission attacking the reasonableness of the line-haul rates. In this connection it should be noted that the complaints filed in Nos. 31105 and 31106,

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Stacking Lumber, 168 I.C.C. 37; *Bracing Charges at North Atlantic Ports*, 279 I.C.C. 623; *Allowances for Stacking*, 179 I.C.C. 780; *Pickup and Delivery on Interterritorial Traffic*, 284 I.C.C. 581; and *Pick-Up and Delivery Charges in Official Territory*, I. & S. Docket No. 6013 (April 24, 1953).

[6] The text of this provision, 49 U.S.C. 13(1), is annexed as Appendix C hereto.

which were dismissed by the order of December 15, 1952, were directed to the unloading charges only, and not to the line-haul rates.

While the Commission is not precluded from considering the line-haul rates, it does not have to consider them in determining the reasonableness of separately stated accessorial charges. In *Barringer & Co.* v. *United States*, 319 U.S. 1, 9, 10, the Supreme Court said:

> "But the decision whether the circumstances and conditions are such as to justify a difference in the accessorial charge, or rather to require that any adjustment be made in the line-haul charge, is one which the statute has left to the determination of the Commission, which Congress has entrusted with the power and duty of guarding against the prohibited favoritism."

A prior existing custom of performing the additional service without additional charge does not prohibit the making of a charge. *United States* v. *Smelting Co.*, 339 U. S. 186.

The reasons for a parity of unloading charges at New York and Philadelphia, in view of their long-standing competitive relationship, are fully stated by the Commission at 272 I.C.C. 648, 663.

Plaintiff-Appellants assert that the Commission's Orders should be annulled and set aside because the railroads did not carry the "burden of proof". The railroads put into the record all the facts necessary to justify the Commission's action, but the significant consideration now is that the facts of record do provide such justification.

It was entirely proper for the Commission to make its Order of December 15, 1952, dismissing the complaints against the approved unloading charges, because it had just completed a lengthy investigation, consisting of three sepa-

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rate hearings and four oral arguments, into the lawfulness of the unloading charges. There was no reason for a further investigation, particularly since the complaints alleged no new facts or changed conditions.

Conclusion

The law is clear and well established that the courts will not annul and set aside orders made by the Interstate Commerce Commission in accordance with the statute, upon due process, and with findings substantially supported by the evidence. That law is applicable here.

Accordingly, there being no substantial questions of law involved, this Motion to Affirm should be granted.

Respectfully submitted,

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Appellees.

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APPENDIX "A"

ORDER OF THE INTERSTATE COMMERCE COMMISSION—INVESTIGATION AND SUPERIOR COURT DOCKET NO. 5500

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 7th day of May, A. D. 1952.

Investigation and Suspension Docket No. 5500

UNLOADING CHARGES ON FRUITS AND VEGETABLES AT NEW YORK AND PHILADELPHIA

It appearing, That on October 4, 1948, the Commission made and filed its report and entered its order in the above-entitled proceeding, that on June 9, 1949, this proceeding was reopened for rehearing, and that by notice of October 10, 1950 the proceeding was assigned for further hearing;

It further appearing, That the proceeding has been reheard and further heard, and that the Commission, on the date hereof, has made and filed a report on rehearing and further hearing containing its findings of fact and conclusions thereon, which said report and the aforesaid report of October 4, 1948, are hereby referred to and made parts hereof:

It is ordered, That the aforesaid order of October 4, 1948, be, and it is hereby, vacated and set aside

It is further ordered, That said respondents be, and they are hereby notified and required to cancel the schedules naming the unloading charges under investigation herein, on or before July 3, 1952, upon notice to this Commission and to the general public by not less than one day's filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and that the proceeding be discontinued.

W. P. BARTEL,
Secretary.

[SEAL.]

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APPENDIX "B"

ORDER OF THE INTERSTATE COMMERCE COMMISSION—DOCKET NOS. 31.105 AND 31,106

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 15th day of December, A. D. 1952.

No. 31105

FLORIDA CITRUS COMMISSION, ET AL.,

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.

No. 31106

FLORIDA CITRUS COMMISSION, ET AL.,

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.

It appearing, That in Investigation and Suspension Docket No. 5500, Unloading Charges, Fruits and Vegetables, N. Y. and Phila., 286 I.C.C. 119, the Commission, on May 7, 1952, upon rehearing and further hearing, modified the finding in the prior report therein, 272 I.C.C. 648, and found that the shippers should not be required to pay more than certain specified unloading charges on fresh fruits and vegetables, in carloads, at New York, N. Y., and Philadelphia, Pa.; that respondents were required to cancel certain suspended schedules naming proposed increased unloading charges but without prejudice to the establishment of the unloading charges stated in the findings; and that respondents subsequently canceled the suspended schedules and made effective the stated charges;

It further appearing, That the complaints in Nos. 31105 and 31106 assail on substantially the same grounds the unloading charges approved in said report and published by the defendants; that complainants therein were parties to

I. & S. 5500; and that defendants' have filed motions to dismiss such complaints, and complainants have replied thereto;

And it further appearing, Upon consideration of such motions and replies that the circumstances and conditions with respect to the approved unloading charges have not materially changed since substantially the same issues were decided by the Commission in the I. & S. No. 5500, and that no reasonable grounds appear for further investigation of such charges or investigation of the matters in connection therewith specified in the complaints:

It is ordered, That defendants' motions to dismiss the complaints be, and they are hereby, granted, and that the complaints in Nos. 31105 and 31106 be, and they are hereby, dismissed.

By the Commission.

[SEAL.]

GEORGE W. LAIRD,
Acting Secretary.

APPENDIX "C"

PERTINENT SECTION OF THE INTERSTATE COMMERCE ACT—SECTION 13, PARAGRAPH (1)

49 U. S. CODE SEC. 13(1)

Sec. 13. (1) That any person, firm, corporation, company, or association or any mercantile, or agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this part, in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time,

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to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

APPENDIX "D"

PERTINENT SECTION OF THE INTERSTATE COMMERCE ACT—
SECTION 6, PARAGRAPH (1)

SECTION 6, PARAGRAPH (1) OF INTERSTATE COMMERCE ACT—
49 U. S. CODE, SEC. 6(1)

SEC. 6. (1) That every common carrier subject to the provisions of this part shall file with the Commission created by this part and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in

any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this part.

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